

June 17, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tri-Valley CAREs

Date of Filing: May 15, 2009

Case Number: TFA-0308

On May 15, 2009, Tri-Valley CAREs (Appellant) filed an Appeal from a determination issued to it on April 15, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified 100 documents responsive to the Appellant's request. The Appellant challenges NNSA/SC's withholding in their entirety 62 of the documents and the withholding of portions of one other document. This appeal, if granted, would require NNSA/SC to release the withheld information to the Appellant.

I. Background

On June 26, 2007, the Appellant requested all documents related to programs, projects, reports, schedules, letters, notes and memos concerning the Tritium Facility Modernization Project at Lawrence Livermore National Laboratory (LLNL). June 26, 2007, Request Letter from Appellant to NNSA/SC. On October 11, 2007, the Appellant supplemented its request for information. October 11, 2007, Request Letter from Appellant to NNSA/SC. On March 2, 2009, NNSA/SC responded to the request and informed the Appellant that it had found 100 documents responsive to its request. March 2, 2009 Determination Letter from Carolyn Becknell, NNSA/SC, to Appellant. It withheld 62 of those documents in their entirety and one document in part, all pursuant to Exemption 2 of the FOIA.^{1/} *Id.* On March 30, 2009, the Appellant appealed the March 2, 2009, determination to the Office of Hearings and Appeals (OHA). On April 16, 2009, OHA dismissed the Appeal because NNSA/SC withdrew its March 2, 2009, determination, so that it could include a list of

^{1/}NNSA/SC also withheld portions of two documents under Exemption 6 of the FOIA. Those withholdings are not at issue in this Appeal.

documents with the determination. April 16, 2009, Dismissal Letter from Fred L. Brown, OHA, to Appellant. On April 15, 2009, NNSA/SC issued a new determination. April 15, 2009, Determination Letter from Carolyn Becknell, NNSA/SC, to Appellant. The new determination withheld the same documents under the same rationale. *Id.* The only difference between the two determinations was the inclusion of a list of the documents in the second determination. On May 15, 2009, the Appellant filed this Appeal, claiming that NNSA/SC improperly withheld the information under Exemption 2 because the information is not “within the terms of the statutory language as personnel rules or internal practices of the agency.” May 5, 2009, Appeal Letter at 4 from Robert Schwartz, Attorney, Appellant, to Director, OHA (May 5, 2009, Appeal Letter). In addition, the Appellant claimed that NNSA/SC failed to provide sufficient justification for how the withheld information would allow individuals to engage in criminal activity. *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). “An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency’s burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 2 is at issue in this case.

1. Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). “Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes.” *Judicial Watch, Inc., v. Dep’t of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (“low two” information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (“high two” information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). NNSA/SC asserts that the information at issue in the present case falls within the second category, “high two”

information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the “high two” category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under “high two” must be able to show that (1) the requested information is “predominantly internal,” and (2) its disclosure “significantly risks circumvention of agency regulations or statutes.” *Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (*en banc*).

As referenced above, NNSA/SC withheld 62 documents in their entirety and a portion of one other document under FOIA Exemption 2. NNSA/SC explained in its Determination Letter that the withheld information is inherently internal. Determination Letter at 2. NNSA/SC further stated that the anti-circumvention protection of Exemption 2 is applicable in this case because the information “could benefit adversaries by helping them identify possible vulnerabilities, as well as provide them the opportunity to target this [Tritium] facility.” *Id.* Thus, it is “high 2” information and exempt from disclosure under Exemption 2.

We have reviewed an unredacted version of the one document that was released in part to the Appellant. We have also reviewed the 62 documents withheld in their entirety. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that information which “does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.” *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that NNSA/SC withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. The 62 documents withheld in their entirety are architectural drawings. The document with portions redacted contains specific plans for modernization of the Tritium facility. Accordingly, these meet the first prong of the *Crooker* test and are predominantly internal.

The information, with two exceptions, meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the “high two” exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d at 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the Tritium facility. Accordingly, disclosure of the information at issue risks circumvention of DOE’s efforts to comply with its statutory mandate to provide secure and safe stewardship of nuclear and other dangerous materials.

See, e.g., 42 U.S.C. § 2284 (statute prohibiting sabotage of nuclear facilities). Even though this Appellant may have no intention to identify vulnerabilities of the Tritium facility, if DOE were to release these documents to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argues that NNSA presented conclusory and generalized allegations about how the withheld information would risk circumvention of agency regulation. Appeal Letter at 4. We disagree. We believe that NNSA/SC explained its withholding properly. Any further information may also lead a malefactor to identify vulnerabilities. Therefore, because of the significant danger of circumvention of DOE regulatory security responsibility involved in public release, we find that the information, with two exceptions, was properly withheld under the “high two” prong of Exemption 2.

We carefully reviewed the 62 documents which were withheld in their entirety by NNSA/SC. These are architectural drawings. After reviewing the documents, we believe that all the drawings, but three, can be withheld under Exemption 2. NNSA/SC agreed that three documents can be released to the Appellant: document number 13, the topographic survey; document number 14, the site demolition plan; and document number 15, the grading and paving plan. We are remanding the matter to NNSA/SC for release of these three documents.

2. Segregability

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that NNSA/SC withheld. NNSA/SC was very careful with its redactions from the one document. We believe that none of the information that was redacted could be reasonably segregated. Consequently, any releasable material is inextricably intertwined with the Exemption 2 protected information.

In regard to the 59 drawings withheld in their entirety, we believe that some of the textual information contained on the drawings could be released. For example, drawing 52 contains only symbols and legends. It is not clear to us why this drawing could not be released. Also, there are certain pages that contain general information that might also be released. For example, drawing 12 contains a map of Livermore, California. We will remand the matter to NNSA/SC for a new determination regarding the 59 drawings.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has

indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. In regard to the one document which was redacted in part, NNSA/SC claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the Tritium Facility. It is therefore obvious that release of the information would not be in the public interest.

III. Conclusion

Except as discussed above, the information was properly withheld under Exemption 2. Therefore, we will grant the Appeal in part and remand the matter to NNSA/SC for release of documents 13, 14, and 15 and a new determination on the segregability of information in the other 59 drawings.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tri-Valley CAREs, Case No. TFA-0308, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall release document numbers 13, 14, and 15 and issue a new determination regarding the other 59 drawings in accordance with the instructions set forth in the above Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 17, 2009